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No. 88-385

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OFELIA RODRIGUEZ DE QUIJAS, et al.,

Petitioners,

v.

SHEARSON/AMERICAN EXPRESS, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

THEODORE A. KREBSBACH
Counsel of Record for Respondent
Office of the General Counsel
Shearson Lehman Hutton Inc.
Two World Trade Center
New York, New York 10048
(212) 528-0565

JEFFREY L. FRIEDMAN
Office of the General Counsel
Shearson Lehman Hutton Inc.
(212) 528-0650
Of Counsel

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QUESTION PRESENTED

Whether the Court's holding in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332 (1987), mandates arbitration of claims asserted under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2) (1982)?

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No. 88-385

OFELIA RODRIGUEZ DE QUIJAS, et al.,

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v.

SHEARSON/AMERICAN EXPRESS, INC.,

Respondent.

BRIEF OF RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 845 F. 2d 1296, and is reproduced in the Brief in Opposition to the Petition for a Writ of Certiorari ("Brief in Opposition") at Appendix B. The order of the court of appeals denying petitioners' motion for rehearing *en banc* is reported at 850 F. 2d 1582 and is reproduced in the Brief in Opposition at Appendix C. The opinions of the United States District Court for the Southern District of Texas are unreported but are reproduced in the Brief in Opposition at Appendix D and Appendix E.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1988 and is reproduced in the Brief in Opposition at Appendix F. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED*

United States Arbitration Act

Sec. 2, 9 U.S.C. § 2

Sec. 3, 9 U.S.C. § 3

Securities Act of 1933

Sec. 12(2), 15 U.S.C. § 77*l*(2)

Sec. 14, 15 U.S.C. § 77n

Sec. 22(a), 15 U.S.C. § 77v(a)

Securities Exchange Act of 1934

Sec. 10(b), 15 U.S.C. § 78j(b)

Sec. 27, 15 U.S.C. § 78aa

Sec. 29(a), 15 U.S.C. § 78cc(a)

* The texts of these provisions are reproduced in full at Appendix A hereto.

STATEMENT OF THE CASE

This case involves the enforceability of agreements to arbitrate disputes under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2). Petitioners opened securities accounts with respondent Shearson Lehman Hutton Inc. ("Shearson"), in a Shearson branch office located in Brownsville, Texas and entered into Customer Agreements with Shearson at or about the time they opened their accounts.[1] Each of these agreements provides that any controversy arising out of or relating to the accounts of petitioners is to be resolved through the arbitration rules of one of three designated self-regulatory organization ("SRO") arbitration forums:

> Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I [the customer] may elect.

Petitioners filed complaints against Shearson and Mr. Deaton in the United States District Court for the Southern District of Texas on August 23, 1985 and November 27, 1985. Petitioners alleged that there was excessive and unauthorized trading in their accounts, that false statements were made and material facts omitted from the advice given to them, and that certain securities purchased in their accounts were not appropriate in

[1] Petitioners are those individuals listed in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Petition"). *See* Petition at 1 n.1. The registered representative who handled petitioners' accounts at Shearson, Jon Grady Deaton, a defendant below, was not a party to the appeal before the court of appeals, is not a party to this proceeding, and is also no longer employed by Shearson. Shearson, named herein as Shearson/American Express, Inc., is a wholly owned subsidiary of Shearson Lehman Hutton Holdings Inc., which is owned in part by the American Express Company and the Nippon Life Insurance Company. E.F. Hutton & Company, Inc. is a wholly owned subsidiary of The E.F. Hutton Group, Inc. which is wholly owned by Shearson.

light of their investment objectives. Petitioners alleged that this conduct constituted violations of: (a) §§ 12(2) and 17(a) of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1982) (the "Securities Act"); (b) § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1982) (the "Exchange Act") and Securities and Exchange Commission ("SEC" or "Commission") Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240-10b-5; (c) §§ 15(c)(1) and 15(c)(2) of the Exchange Act and SEC Rules 15cl-2, 15cl-4 and 15cl-6 promulgated thereunder; (d) §§ 206 and 215 of the Investment Advisors Act of 1940, 15 U.S.C. § 80b-1 *et seq.* (1982); (e) the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* (1982) ("RICO"); (f) various state and common laws; and (g) various rules and regulations of the New York Stock Exchange, Inc. ("NYSE") and the National Association of Securities Dealers, Inc. ("NASD").

Shearson responded to the complaints by filing a motion in the district court for an order dismissing the claims of petitioners asserted under § 17(a) of the Securities Act, 15 U.S.C. § 77q (1982), and for an order enforcing the arbitration agreements of the parties pursuant to § 3 of the United States Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982).

The District Court Opinions

The district court, in an opinion dated November 18, 1986, granted Shearson's motion to dismiss the claims of petitioners asserted under § 17(a) and its motion to stay proceedings pending arbitration of all the remaining claims of petitioners except those asserted under § 12(2) of the Securities Act, and those asserted under the Exchange Act. The district court based its refusal to order the parties to arbitrate their § 12(2) disputes on *Wilko v. Swan*, 346 U.S. 427 (1953), stating that the Court in *Wilko* held that an agreement to arbitrate a § 12(2) claim is prohibited by § 14 of the Securities Act, 15 U.S.C. § 77n, an anti-waiver provision, as an agreement waiving the jurisdictional provision of the Securities Act. This provision of the Securities Act allows a plaintiff to bring suit under the statute in either a federal court or a state court. *See* § 22(a) of the Securities Act, 15 U.S.C. § 77v(a). The district court's refusal to order arbitration of the parties' Exchange Act disputes was based on prior circuit precedent extending the rationale underlying *Wilko* to the Exchange Act. *See* Brief in Opposition, Appendix D at A-18-19.

Shearson filed a motion with the district court on June 29, 1987, requesting that it reconsider its refusal to order the parties to arbitrate the claims asserted by petitioners under § 12(2) of the Securities Act and § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), based on the Court's opinion in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332 (1987). The Court in *McMahon* held that agreements to arbitrate claims asserted under § 10(b) of the Exchange Act and RICO are enforceable. The district court, in an opinion dated July 14, 1987, ruled that the § 10(b) claims of petitioners were arbitrable but that their § 12(2) claims were nonarbitrable. *See* Brief in Opposition, Appendix E. Shearson appealed the district court's refusal to enforce the parties' agreement to arbitrate their § 12(2) disputes to the United States Court of Appeals for the Fifth Circuit.

The Court of Appeals Opinion

The court of appeals, in an opinion dated May 31, 1988, reversed the district court's order denying Shearson's motion to stay proceedings pending arbitration of the § 12(2) claims of petitioners, and held that the rationale underlying *McMahon* mandates enforcement of agreements to arbitrate § 12(2) claims. *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 845 F. 2d 1296, 1299 (5th Cir.), *reh'g en banc denied*, 850 F. 2d 1582 (1988) (per curiam). The court of appeals denied petitioners' motion for an *en banc* rehearing of its opinion on June 22, 1988. Petitioners filed the Petition on August 31, 1988, requesting that the Court review the order of the court of appeals. Shearson filed the Brief in Opposition on October 20, 1988 which urged the Court to grant certiorari and resolve the post-*McMahon* conflict that exists among the courts of appeals as well as the district courts and state courts regarding the enforceability of agreements to arbitrate § 12(2) claims. The Court granted certiorari on November 14, 1988.

SUMMARY OF ARGUMENT

The Court should affirm the unanimous ruling of the United States Court of Appeals for the Fifth Circuit which enforced the agreements of the parties to arbitrate their disputes under § 12(2) of the Securities Act. The court of appeals held that the Court's contrary decision in *Wilko* was effectively overruled in *McMahon*, wherein the Court held that the Arbitration Act requires enforcement of agreements to arbitrate disputes under § 10(b) of the Exchange Act, because arbitration is adequate to protect substantive rights under the statute.

The Court's opinion in *McMahon* is consistent with its modern arbitration jurisprudence which mandates enforcement of agreements to arbitrate statutory disputes under the Arbitration Act absent evidence of a contrary congressional intent. Such an intent must be expressed in a statute or its legislature history, or in an inherent conflict between arbitration and the statute's underlying purposes. A party opposing arbitration must meet the burden of demonstrating congressional intent to exempt a statute from the Arbitration Act. *See McMahon*, 107 S. Ct. at 2337. This test has been applied by the Court in recent years as the basis for enforcing agreements to arbitrate disputes under the Exchange Act, RICO, the antitrust laws, and other statutory claims. *See McMahon; Perry v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

The Court in *McMahon* applied its arbitrability test to *Wilko* and concluded that *Wilko* was not based on any evidence of congressional intent, but on an unsubstantiated mistrust of arbitration. The Court rejected *Wilko*'s presumption that enforcing an agreement to arbitrate a § 12(2) dispute would result in the loss by an investor of statutory rights. It was this presumption that supported *Wilko*'s conclusion that Congress must have intended the anti-waiver provision in § 14 of the Securities Act to bar waiver of the judicial forum to resolve § 12(2) disputes. The Court held that such a provision prohibits only waiver of substantive obligations imposed by a statute. *See McMahon*, 107 S. Ct. at 2338. Since there are no substantive rights or obligations imposed by a statute which are waived in an arbitration forum, an anti-waiver provision does not prohibit an agreement to arbitrate § 12(2) disputes.

Furthermore, the Court held that arbitration forums subject to SEC oversight, which are the forums at issue in the present case, are adequate to ensure the protection of rights of investors under the Exchange Act. *Id.* at 2341. The SEC's broad oversight authority over the SRO arbitration forums was granted by Congress to the SEC in 1975 and thus did not exist at the time *Wilko* was decided.

The SEC has advised the Court that its authority over the SRO arbitration forums compels the same conclusion for any federal securities law claim brought at these forums, including § 12(2) claims. *See* Brief for the SEC *as Amicus Curiae* in *McMahon* ("SEC *amicus* brief" at 20.) A contrary holding would require the incongruous finding that SRO arbitration is adequate to protect the rights of investors under the Exchange Act but not the Securities Act, when the Court has found no substantive difference between the two statutes and found them to be "interrelated components of the federal regulatory scheme governing transactions in securities." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983). Moreover, a holding that an arbitration forum is inadequate to resolve § 12(2) disputes would be inconsistent with the Court's holding that such a forum is adequate to resolve statutory disputes under the Exchange Act, RICO, the antitrust laws and other statutes.

Accordingly, the Court should place agreements to arbitrate § 12(2) claims on the same footing as agreements to arbitrate any other statutory dispute and reject once and for all the outdated judicial mistrust of arbitration which continues to survive *Wilko*. The Court should not be dissuaded by *stare decisis* concerns in reaching this result since it can either overrule *Wilko* as inconsistent with *McMahon* or limit *Wilko* to prohibit arbitration agreements that designate forums incapable of protecting statutory rights. Should the Court render agreements to arbitrate § 12(2) claims enforceable, that holding should be applied retroactively to the agreement of the parties in the present case.

ARGUMENT

I. Agreements to Arbitrate Claims Asserted Under § 12(2) of the Securities Act of 1933 Should be Enforced Since Congress Did Not Intend to Create an Exception to the United States Arbitration Act For This Statute.

The Arbitration Act provides the starting point for determining whether an agreement to arbitrate a particular dispute is enforceable. *See McMahon*, 107 S. Ct. at 2337. The Act provides that arbitration agreements "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. A court must stay its proceedings under the Act and direct the parties to a valid arbitration agreement to resolve their arbitrable disputes through arbitration. 9 U.S.C. § 3. The Act also authorizes a federal district court to order arbitration when a party to a valid arbitration agreement has failed, neglected or refused to comply with the agreement. 9 U.S.C. § 4.

The legislative history of the Arbitration Act reveals the strong congressional policies underlying the Act and the reasons why Congress enacted this legislation. The Arbitration Act was intended to reverse centuries of judicial hostility to arbitration agreements that had developed in the English Courts, which were fearful of being ousted from their jurisdiction. This judicial hostility was eventually adopted by the American Courts. H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924). Congress intended for the Act to prevent courts from refusing to enforce valid contractual agreements of parties to arbitrate their disputes and to enforce these contracts in the same manner as any contract. The Court has held that the desire of Congress to ensure that courts enforce arbitration agreements is the primary policy underlying the Act. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-21 (1985). The desire of Congress to allow parties to resolve their disputes expeditiously through arbitration as an alternative to lengthy and costly litigation in a judicial forum

is another congressional policy underlying the Act. H.R. Rep. No. 96, 68th Cong., 1st Sess. at 2; *see also Byrd*, 470 U.S. at 220.

The Court has consistently affirmed the strong congressional policies expressed in the Arbitration Act[2] and has stated that the Act "creates a body of federal substantive law" applicable in both federal and state courts. *See Cone*, 460 U.S. at 24-25 & n.32. The Court has also declared that the Act applies to statutory disputes. *See McMahon*, 107 S. Ct. at 2337 (citing *Mitsubishi*, 473 U.S. at 627). The Arbitration Act applies to a statute unless Congress expressed an intention to prohibit a waiver of judicial remedies for the statutory rights at issue. *McMahon*, 107 S. Ct. at 2337. The burden is on the party opposing arbitration to demonstrate such a contrary congressional intent either in the text or legislative history of the statute or from an inherent conflict between the underlying purposes of the statute and arbitration. *McMahon*, 107 S. Ct. at 2337-38.

Petitioners cannot carry the burden of demonstrating that Congress intended to prohibit a waiver of the judicial forum to resolve disputes under § 12(2) of the Securities Act. Neither the text of the Securities Act nor the legislative history of the securities laws evidences such an intent and there is no conflict between the underlying purposes of § 12(2) and resolving disputes under this statute through arbitration.

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[2] *See, e.g., McMahon; Perry; Mitsubishi; Byrd; Keating; Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Scherk*.

A. The Text of the Securities Act Contains No Evidence of Congressional Intent to Prohibit Enforcement of Agreements to Arbitrate § 12(2) Claims.

There is no language in the text of the Securities Act that evidences an intent of Congress to prohibit a waiver of the judicial forum to resolve § 12(2) disputes. Prior to the Court's opinion in *McMahon*, the only language in the statute that could even arguably be so construed is the anti-waiver provision contained in § 14 which provides: "Any [stipulation] to waive compliance with any provision of [the Securities Act] shall be void." The *Wilko* Court held that an agreement to arbitrate a § 12(2) dispute is a stipulation that impermissibly waives a plaintiff's right to pursue a § 12(2) claim in a judicial forum pursuant to the jurisdictional provision in § 22(a) of the Securities Act. *Wilko*, 346 U.S. at 434-35. The *Wilko* Court reached this conclusion even though neither the anti-waiver provision nor any other provision of the Securities Act discusses arbitration.

1. The Court in *McMahon* Rejected *Wilko*'s Interpretation of an Anti-Waiver Provision as Evidencing Congressional Intent to Prohibit a Waiver of The Judicial Forum to Resolve § 12(2) Disputes.

The Court in *McMahon* found that the *Wilko* Court's interpretation of the anti-waiver provision of the Securities Act was based on the Court's mistrust of arbitration and its belief that only a judicial forum can adequately enforce substantive rights afforded by § 12(2):

> The conclusion in *Wilko* was expressly based on the Court's belief that a judicial forum was needed to protect the substantive rights created by the Securities Act . . . *Wilko* must be understood, therefore, as holding that the plaintiff's waiver of the "right to select the judicial forum" . . . , was unenforceable only because arbitration was judged inadequate to enforce the statutory rights created by § 12(2).

McMahon, 107 S. Ct. at 2338. The *Wilko* Court believed that arbitration is deficient and not capable of protecting rights afforded by § 12(2) of the Securities Act for several reasons. The Court stated that arbitrators are not capable of making "subjective findings on the purpose and knowledge" of an alleged violator of § 12(2) and cannot make legal conclusions "without judicial instruction on the law." *Wilko*, 346 U.S. at 435-36. The Court also believed that arbitration is inadequate to protect statutory rights since an arbitration award "may be made without explanation of [arbitrators'] reasons and without a complete record of their proceedings." *Id.* at 436. Lastly, the *Wilko* Court stated that it was not satisfied that the grounds to review an arbitration award contained in the Arbitration Act are sufficient: "[T]he power to vacate an award is limited," and . . . "interpretations of the law by arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." *Id.* at 436-37.

The perceived deficiencies of arbitration underlying the *Wilko* Court's interpretation of an anti-waiver provision were found by the Court in *McMahon* to be "the heart of the Court's decision in *Wilko*," and not supported by any evidence.[3] The Court, in opinions rendered subsequent to *Wilko*, has rejected the specific aspects of arbitration described by the *Wilko* Court as deficient:

> [T]he reasons given in *Wilko* reflect a general suspicion of the desirability of arbitration and, the competence of arbitral tribunals – most apply with no greater force to the arbitration of securities disputes

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[3] "As Justice Frankfurter noted in his dissent in *Wilko*, the Court's opinion did not rest on any evidence, either 'in the record . . . [or] in the facts of which [it could] take judicial notice,' that 'the arbitral system . . . would not afford the plaintiff the rights to which he is entitled [under § 12(2)]'." *McMahon*, 107 S. Ct. at 2340 (citing *Wilko*, 346 U.S. at 439 (Frankfurter, J., dissenting)).

than to the arbitration of legal disputes generally. It is difficult to reconcile *Wilko*'s mistrust of the arbitral process with this Court's subsequent decisions involving the Arbitration Act. See, *e.g.*, [*Mitsubishi*, *Byrd*, *Keating*, *Cone*, *Scherk*]. Indeed, most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable.

Id. at 2340.[4]

Since the Court in *McMahon* found that the *Wilko* Court's interpretation of an anti-waiver provision was based solely on an unsubstantiated mistrust of arbitration and not on any discernible evidence of congressional intent, petitioners cannot rely on *Wilko* to support their burden of showing that Congress intended to prohibit agreements to arbitrate § 12(2) disputes.

2. Congress Intended an Anti-Waiver Provision to Prohibit Agreements That Waive Compliance With Substantive Duties Imposed by the Federal Securities Laws.

The Court in *McMahon* corrected the *Wilko* Court's erroneous conclusion that an agreement to arbitrate a § 12(2) claim is void under the anti-waiver provision of the Securities Act as a prohibited stipulation that waives compliance with the jurisdictional provision of the statute. In construing a virtually identical provision in the Exchange Act,[5] the Court in *McMahon* held that an anti-waiver provision was intended by Congress to prohibit enforcement of agreements that waive compliance with substantive duties imposed by a statute. *See Id.* at 2338-43. The Court held that an anti-waiver provision thus does not prohibit a waiver of a statute's jurisdictional provision since the latter provision does not impose any duty with which one must comply. *Id.* at 2338.

[4] The Court has specifically rejected the *Wilko* Court's assumptions that arbitration forums cannot handle the factual and legal complexities of statutory disputes; substantive rights afforded by a statute are lost in arbitration; arbitrators will not follow the law; and judicial review of an arbitration award is insufficient to ensure compliance with the law. *See McMahon*, 107 S. Ct. at 2340 (citing *Mitsubishi*).

[5] *See* § 29(a) of the Exchange Act, 15 U.S.C. § 78cc(a).

The fact that the anti-waiver provision of the Securities Act was intended by Congress to prohibit agreements relieving parties from the duty of substantive compliance with any provision of the statute, such as an exculpatory agreement, rather than an arbitration agreement, is supported by examining the historical use of anti-waiver provisions. Anti-waiver provisions were first utilized in England. *See* L. Loss, *Fundamentals of Securities Regulation* (1983) at 1189 n.51. Prior to 1900, English Courts had honored stipulations which bound purchasers of securities to waive substantive compliance with statutory provisions so long as the courts were satisfied that the party waiving the rights afforded him by a statute was not deceived into signing the agreement. *See*, *e.g.*, *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421, 435-38 (C.A.); *Cackett v. Keswick*, [1902] 2 Ch. 456, 476 (C.A.).

The Parliament enacted identical anti-waiver provisions in sections 38(2) and 417(2) of the Companies Act of 1900 in response to the enforcement by the English Courts of pre-dispute waiver agreements:

> A condition requiring or binding an applicant for shares in or debentures of a company to waive compliance with any requirement . . . shall be void.

11 & 12 Geo. 6, ch. 38, §§ 38(2), 417(2). This anti-waiver provision was intended to prevent parties from waiving compliance with the Companies Act which prevented misrepresentations in connection with the sale of securities that were the subject of a prospectus. *See* 84 Parl. Deb. (4th Ser.) 1161 (1900). Subsequent to the enactment of anti-waiver provisions in England, sellers of securities have been precluded from enforcing predispute agreements which caused purchasers of securities to waive their right to enforce compliance with rights afforded by statutes. *See* L. Loss, *Fundamentals of Securities Regulation* at 1189 n.52. Thus, an anti-waiver provision has historically been utilized to prohibit an agreement that waives compliance with substantive duties imposed by a statute. *See* Fletcher, *Privatizing Securities Disputes Through The Enforcement of Arbitration Agreements*, 71 Minn. L. Rev. 393, 402-03 (1987).

The Court's opinion in *McMahon*, combined with an examination of the historical utilization of an anti-waiver provision, reveals that there is simply no evidence supporting the belief that the enacting Congress intended that § 14 of the Securities Act prohibit an agreement to arbitrate Securities Act disputes. *See* Fletcher, *Learning to Live With the Federal Arbitration Act – Securities Litigation in a Post-McMahon World*, 37 Emory L.J. 99, 110 (1988) ("Fletcher, *Arbitration*").

3. Enforcement of an Agreement to Arbitrate a § 12(2) Dispute Would Not Effect a Waiver of Compliance With Any Duty Imposed by the Securities Act Since Rights Afforded by the Federal Securities Laws Can Be Effectively Vindicated in an Arbitration Forum.

The Court has ruled in all of its recent cases involving the arbitrability of statutory disputes that a prospective litigant may vindicate a statutory cause of action in an arbitration forum since such a forum is capable of enforcing substantive rights and obligations afforded by a statute. *See McMahon*, 107 S. Ct. at 2339 (citing *Mitsubishi*, 473 U.S. at 628).

In no case, with the exception of the Court's discussion of the arbitrability of § 10(b) disputes in *McMahon*, did the Court conduct an independent inquiry into the adequacy of the arbitration forum at issue – rather, it has assumed that arbitrators are capable of applying the law and enforcing statutory rights and obligations. Specifically, the Court did not inquire into the adequacy of the arbitration forums when it held enforceable agreements to arbitrate RICO claims in *McMahon*, antitrust claims in *Mitsubishi*, and § 10(b) claims in *Scherk*, assuming that the designated arbitration forums were adequate to protect the statutory rights at issue.

The Court should assume that arbitration is an adequate forum to resolve rights afforded by § 12(2) of the Securities Act; otherwise, the enforceability of every arbitration agreement will require a preliminary judicial inquiry into the adequacy of the forum, thwarting the contractual right of the parties to obtain a swift resolution of their dispute. To the extent that an arbitration

forum proves to be inadequate to enforce statutory rights in a particular case, a party has ample opportunity after the hearing to move to vacate the arbitration award under the Arbitration Act. The Court has recognized that sufficient statutory safeguards are in place to ensure the effective judicial review of arbitration awards. *See McMahon*, 107 S. Ct. at 2340 (citing *Mitsubishi*, 473 U.S. at 636-37 and n.19); *see also* 9 U.S.C. § 10.

The only reason the Court examined the adequacy of the arbitration forums at issue in *McMahon*, in its discussion of the arbitrability of § 10(b) disputes, was to rebut *Wilko*'s incorrect assumption that arbitration is inadequate to resolve federal securities law disputes. The Court's unanimous holding in *McMahon* that RICO claims are arbitrable without any corresponding analysis of the adequacy of the forum highlights the fact that this is an analysis which the Court does not normally undertake. Nevertheless, the Court in *McMahon* examined the adequacy of the identical arbitration forums at issue in the present case and concluded that they are adequate to protect rights afforded by the securities laws. Accordingly, no duty imposed by the Securities Act is waived by enforcing agreements of parties to arbitrate their disputes at an SRO arbitration forum.

a. The Court in *McMahon* Ruled that Self-Regulatory Organization Arbitration Forums which are Overseen by the Securities and Exchange Commission Are Adequate to Protect the Rights of Investors Under the Federal Securities Laws.

The Court in *McMahon* unequivocally held that arbitration at SRO forums is adequate to protect the rights of investors under the federal securities laws, notwithstanding the *Wilko* Court's contrary conclusion in 1953:

> Even if *Wilko*'s assumptions regarding arbitration were valid at the time *Wilko* was decided, most certainly they do not hold true today for the arbitration procedures subject to the SEC's oversight authority.

McMahon, 107 S. Ct. at 2341.

The Court's finding that SRO arbitration forums are capable of resolving federal securities law disputes was based in large part on the expansive oversight jurisdiction granted by Congress to the SEC in 1975 to regulate these forums. *See McMahon*, 107 S. Ct. at 2341. The Commission's oversight jurisdiction ensures that no amendment to an SRO arbitration rule may occur unless approved by the Commission after providing interested parties an opportunity to comment on the amendment. Moreover, the Commission has the ability on its own initiative, to "abrogate, add to, and delete from" any SRO rule if it finds such changes necessary or appropriate to further the purposes underlying the federal securities laws. *Id.*; *see also* § 19 of the Exchange Act, 15 U.S.C. 78s; SEC *amicus* brief at 13-21. The broad power of the Commission to oversee the SRO forums and ensure their adequacy was not present at the time the Court decided *Wilko*.[6]

The SEC in its *amicus* brief filed in *McMahon* advised the Court that the expansive oversight jurisdiction granted it by Congress in 1975 ensures that SRO arbitration procedures are adequate to protect statutory rights, and that there is no reason to conclude that enforcement of an agreement to arbitrate at an SRO forum would result in a waiver of compliance with any provision of the securities laws. *See* SEC *amicus* brief at 6-7. Furthermore, the SEC represented to the Court that its jurisdiction over SRO arbitration forums ensures that any federal securities law dispute – including § 12(2) disputes – will be adequately resolved at these forums:

> The same conclusion would apply to agreements to arbitrate *any* federal securities-law claim where the arbitration procedures are subject to the Commission's Section 19 authority. Thus, a present-day customer-broker agreement to arbitrate pursuant to SRO arbitration procedures would be enforceable even with respect to claims arising under § 12(2) of the 1933 Act, the section under which the claims in *Wilko* arose, as long as SRO arbitration procedures are specified.

SEC *amicus* brief at 20 (emphasis added).[7]

There is no reasonable basis to conclude that arbitral forums which the Court has ruled are adequate to resolve Exchange Act disputes are not also adequate to resolve Securities Act disputes. In fact, the Court in *McMahon* did not rely on any distinctions between § 12(2) and § 10(b) even though § 12(2) was referred to as a "special right" in *Wilko* since it differs from common law fraud by shifting the burden of proof from the purchaser of a security to the seller. *See Wilko*, 346 U.S. at 431. The dissenting opinion in *McMahon* also refused to accept any argument that the Securities Act is different than the Exchange Act in any substantive manner for purposes of arbitrability. *McMahon*, 107 S. Ct. at 2346-47 and nn.1-2. (Blackmun, J., concurring in part and dissenting in part.)

The Court in *McMahon* was justified in relying on the SEC's oversight jurisdiction in ruling that SRO arbitration forums are adequate to resolve federal securities law disputes. Since 1975, the Commission has sponsored initiatives which have further improved procedures for securities arbitration, that has been conducted for over one hundred years at the NYSE and for over forty years at the NASD. In 1977, the SEC promoted the formation of the Securities Industry Conference on Arbitration ("SICA"), a voluntary association comprised of representatives from the various SROs, the Securities Industry Association, Inc. ("SIA") and the public. SICA developed the Uniform Code of Arbitration ("Uniform Code") which has been expressly adopted by all of the SROs.[8] The SEC solicited public comment on these

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[6] "In 1953, when *Wilko* was decided, the Commission had only limited authority over the rules governing [SROs] and this authority appears not to have included any authority at all over their arbitration rules." *McMahon*, 107 S. Ct. at 2341.

[7] The SEC continues to believe since *McMahon* that SRO arbitration forums are adequate to resolve disputes under any of the federal securities laws. *See* Brief for the SEC as *Amicus Curiae*, *Roney & Co. v. Goren*, No. 88-1874 (6th Cir. 1988) at 4.

[8] *See* SEC *amicus* brief at 17; *see also* Katsoris, *Securities Arbitration After McMahon*, 16 Fordham Urban L.J. 361, 362-64 (1988) ("Katsoris, *Securities Arbitration*").

rules and has expressly approved the Uniform Code and found its rules to be of just and equitable principles of trade. *See* SEC Securities Exchange Act Release No. 16390 (Nov. 30, 1979), 18 S.E.C. Docket 1197 (1979).[9] These are the rules followed by the NYSE, NASD and the American Stock Exchange, Inc. ("AMEX"), the arbitration forums approved in *McMahon* and the same forums at issue in the present case. SICA has met regularly since 1977 to consider and propose various improvements to the securities arbitration process.

Arbitration conducted under the Uniform Code at the SRO forums is similar in many respects to a trial. The parties have the right to be present at the hearing of their dispute and can appear *pro se* or be represented by an attorney. They can present an opening statement, call witnesses to testify on their behalf, cross-examine adverse witnesses, introduce documentation into evidence and present closing statements. *See generally* Hoblin, *Securities Arbitration: Procedures, Strategies and Cases* (1988) at 11-1-14. The Uniform Code provides that counsel for the parties and the arbitrators may subpoena witnesses as provided by applicable law.[10] Moreover, the arbitrators have the power to mandate the appearance at a hearing of any person employed by or associated with a member, such as a customer's stockbroker, and to order production of any documents under that person's control, or under any parties' control.[11]

While the SROs sponsor the arbitration forums, they only provide the facilities for parties to resolve their disputes; ultimately, it is the individual arbitrators who decide each case without influence from the SROs. Arbitrators who serve at SRO forums

[9] *See, e.g.*, Arbitration Rules of the New York Stock Exchange, Inc., 2 NYSE Guide (CCH) ¶¶ 2600-2638; Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., NASD Manual (CCH) ¶¶ 3701-3745; Arbitration Rules of the American Stock Exchange, Inc., 2 AMEX Guide (CCH) ¶¶ 9540-9551J; *see also* Katsoris, *Securities Arbitration* at 364.

[10] *See, e.g.*, 2 NYSE Guide (CCH) ¶ 2619 (Rule 169(a)); NASD Manual (CCH) ¶ 3732 (Sec. 32(a)); 2 AMEX Guide (CCH) ¶ 9548 (Rule 608(a)).

[11] *See, e.g.*, 2 NYSE Guide (CCH) ¶ 2620 (Rule 620); NASD Manual (CCH) ¶ 3733 (Sec. 33); 2 AMEX Guide (CCH) ¶ 9549 (Rule 609).

are generally selected based upon their particular expertise in investments, securities law and securities practice. SRO arbitrators are knowledgeable individuals such as attorneys and retired judges, as well as business persons and other individuals possessing extensive experience in resolving securities disputes.[12]

Every effort is made through the Uniform Code to ensure that all parties receive a panel of fair and impartial arbitrators to hear their claims and that even the appearance of partiality is avoided.[13] Every SRO arbitration panel *must* consist of a majority of arbitrators who are not affiliated with the securities industry (*i.e.*, "public" arbitrators). A public customer may, however, obtain an arbitration panel which consists of a majority of arbitrators from the securities industry if he so requests.[14] The existence of a minority of "securities" arbitrators on every arbitration panel ensures that securities industry expertise will be represented and will assist the public arbitrators, when needed, to understand the particular area of the securities industry involved in the dispute.

Prior to the hearing of a dispute, the parties are informed of the business associations of the arbitrators selected to serve on

[12] From 1980 through 1987, 17,390 arbitration cases were filed with the SROs. *See* Fifth Report of the Securities Industry Conference on Arbitration at 7 (1986) and Minutes of the June 24, 1988 Meeting of SICA, which reported arbitration statistics for 1986 and 1987. Many of these cases involved claims by investors under the federal securities laws. A table of the statistics for 1986 and 1987 is attached to the Brief of the Securities Industry Association as *Amicus Curiae* in Support of the Petition for a Writ of Certiorari ("SIA *amicus* brief in support of Petition") at Appendix A.

[13] The Court has presumed arbitrators to be impartial: "We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent conscientious, impartial arbitrators." *Mitsubishi*, 473 U.S. at 634.

[14] *See, e.g.*, NYSE Guide (CCH) ¶ 2607 (Rule 607(a)); NASD Manual (CCH) ¶ 3719 (Sec. 19); 2 AMEX Guide (CCH) ¶ 9542 (Rule 602(a)); *see also* Katsoris, *Securities Arbitration* at 376-77.

the panel.[15] This gives the parties grounds for the use of a challenge for cause to remove an arbitrator from the panel. The Uniform Code provides that the parties have unlimited challenges for cause and one peremptory challenge to remove arbitrators from the panel.[16] Each arbitrator is required to disclose "any circumstances which might preclude such arbitrator from rendering an objective and impartial determination."[17] Arbitrators who even appear to have a conflict of interest may be disqualified for cause.[18]

Additionally, parties who resolve their disputes through SRO arbitration forums are protected from improper arbitration awards under the Arbitration Act to the same extent as parties to any arbitration proceeding. The Arbitration Act provides that a court may vacate an arbitration award when it is established that the award was tainted by (1) corruption, fraud or undue means; (2) evident partiality or corruption on the part of an arbitrator; (3) misconduct on the part of an arbitrator; or (4) the exceeding or improper execution of an arbitrator's powers. 9 U.S.C. § 10. Furthermore, while an arbitration award will not be set aside due to a misinterpretation of the law by an arbitrator, courts will vacate an award which is found to be "in manifest disregard of the law."[19] Two additional judicially-created grounds

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[15] *See, e.g.*, 2 NYSE Guide (CCH) ¶ 2608 (Rule 608); NASD Manual (CCH) ¶ 3721 (Sec. 21); 2 AMEX Guide (CCH) ¶ 9542 (Rule 602(d)).

[16] *See, e.g.*, 2 NYSE Guide (CCH) ¶ 2609 (Rule 609); NASD Manual (CCH) ¶ 3722 (Sec. 22); 2 AMEX Guide (CCH) ¶ 9542 (Rule 602(e)).

[17] *See, e.g.*, 2 NYSE Guide (CCH) ¶ 2610 (Rule 610); NASD Manual (CCH) ¶ 3723 (Sec. 23); 2 AMEX Guide (CCH) ¶ 9542 (Rule 602(f)).

[18] *Id.*

[19] *See, e.g., O. R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F. 2d 742, 746 (11th Cir. 1988); *Jenkins v. Prudential-Bache Securities, Inc.*, 847 F. 2d 631, 634 (10th Cir. 1988); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F. 2d 930, 933 (2d Cir. 1986); *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F. 2d 743, 749 (8th Cir.), *cert. denied*, 476 U.S. 1141 (1986); *Siegel v. Titan Indus. Corp.*, 779 F. 2d 891, 892 (2d Cir. 1985); *(footnote continued)*

to vacate an arbitration award are when the award is deemed: (1) contrary to public policy or (2) irrational.[20] Although admittedly limited, the grounds to vacate an arbitration award have been expressly found by the Court to be sufficient to ensure that arbitrators comply with the requirements of a statute. *See McMahon*, 107 S. Ct. at 2340 (citing *Mitsubishi*, 473 U.S. at 636-37).

Given these safeguards it is not surprising to note that investors were awarded monetary damages in 55% of the 2,936 SRO arbitrations which were not settled and were conducted through decision in 1987.[21]

b. The SEC Has Acted Since *McMahon* to Ensure the Continued Adequacy and Fairness of the Rules Governing SRO Arbitration Forums.

The SEC has acted since *McMahon* to ensure the continued adequacy and fairness of the SRO arbitration forums by proposing changes to the Uniform Code. These changes were recommended to SICA and the SROs by letter dated September 10, 1987, wherein the SEC reviewed an examination of the SRO arbitration forums it had undertaken over the previous eighteen months and concluded that they operate fairly and efficiently.[22] The SEC requested SICA and the SROs to review its proposals and make their own specific recommendations.

(footnote continued)

Drayer v. Krasner, 572 F. 2d 348, 352 (2d Cir.), *cert. denied*, 436 U.S. 948 (1978); *Swift Indus., Inc. v. Botany Indus. Inc.*, 466 F. 2d 1125, 1130 (3d Cir. 1972); *San Martine Campania de Navegacion v. Saguenay Terminals, Ltd.*, 293 F. 2d 796, 801 (9th Cir. 1961).

[20] *See, e.g., Amoco Overseas Oil Co. v. Astir Navigation Co.*, 490 F. Supp. 32, 37 (S.D.N.Y. 1979); *Botany Indus. v. New York Joint Board*, 375 F. Supp. 485, 490 n.6 (S.D.N.Y.), *vacated on other grounds sub nom., Robb v. New York Joint Board*, 506 F. 2d 1246 (2d Cir. 1974).

[21] *See* SIA *amicus* brief in Support of Petition at 11 & Appendix A.

[22] *See* Letter from Richard G. Ketchum, Director of the Division of Market Regulation of the SEC to all SICA Members (September 10, 1987), *reprinted in* Fitterman, McGuire & Love, *SEC Initiatives for Changes in SRO Arbitration Rules*, 601 PLI 257 (1988) at Appendix A ("SEC Letter"); *see also* SEC *amicus* brief (SRO arbitration forums are adequate to protect statutory rights).

The SEC was especially concerned with the suggestion in the dissenting opinion in *McMahon* that there may be an appearance of bias in favor of the securities industry at the SRO forums, notwithstanding the lack of any evidence to support such a perception.[23] Accordingly, the SEC recommended and the SROs proposed rule changes which would redefine the term "public arbitrator" to ensure that individuals with even marginal ties to the securities industry, such as retired industry personnel, not be included among the public non-industry arbitrators who comprise the majority of every SRO arbitration panel.[24] Furthermore, the rule changes would also require the SRO forums to provide parties with the names and ten-year employment history of all arbitrators selected to serve on a panel.[25] These rule changes make it clear that the SEC and the SROs seek to avoid even a perception of bias.

The SROs have also proposed changes to the Uniform Code which are designed to ensure that an investor voluntarily enters into an arbitration agreement. These proposals require brokerage firms to highlight an arbitration clause in their Customer Agreements and also require that the clause be written in plain English and specify the judicial remedies which an individual waives by agreeing to arbitration.[26] This will ensure that an investor

[23] Constantine N. Katsoris, a Professor of Law at Fordham University School of Law, who has been a Public Member of SICA since its inception in 1977 and who has been widely recognized as a leading commentator on securities arbitration, categorically rejects the statement in the dissenting opinion that there is a "stacked deck" in favor of the securities industry at the SRO arbitration forums. *See McMahon*, 107 S. Ct. at 2355 (Blackmun, J., concurring in part and dissenting in part). Professor Katsoris, who serves as an arbitrator at the NYSE and NASD, states: "In over fifteen years of sitting as a public arbitrator, it has been this author's experience that the securities arbitration procedures have, to date, resulted in an overall good faith effort to provide fair resolution of public securities disputes." Katsoris, *Securities Arbitration* at 384.

[24] *See, e.g.*, Rule 607(a) of the Proposed Amendments to the NYSE Arbitration Rules as filed with the SEC on October 17, 1988 ("Proposed Amendments to the NYSE Arbitration Rules"), a copy of which is attached to the Brief of the SIA as *Amicus Curiae* in Support of Respondent at A-4-5.

[25] *See Id.* at A-7-8 (Rule 611).

[26] *See Id.* at A-19 (Rule 637).

will voluntarily enter into an arbitration agreement. The changes also provide for standardized discovery timetables and a pre-hearing discovery conference conducted by the arbitrators when requested by either party.[27] Finally, the SROs have also proposed that future arbitration awards state the issues involved, the damages claimed and the amount actually awarded.[28]

To date, the NYSE, NASD, AMEX, the Midwest Stock Exchange, Inc., the Municipal Securities Rulemaking Board ("MSRB"), and the Pacific Stock Exchange, Inc. have filed requests with the SEC for approval of these and other amendments to its rules pursuant to § 19(b)(1) of the Exchange Act, 15 U.S.C. § 78s(b)(1). The SEC has to date published the proposed amendments to the NYSE, NASD, AMEX and MSRB arbitration rules and has requested comments from the public and all interested persons.[29] Presumably, the other SROs will also file proposed amendments to their arbitration rules with the Commission which will be consistent with SICA's proposals once the Commission approves the proposals pending before it.

The SEC, SICA and the SROs have a delicate assignment in balancing the demands of greater discovery and other changes in the Uniform Code designed to improve the system for all parties, with the desire to maintain the fundamental nature of the securities arbitration process which makes it so appealing:

> What is attractive about arbitration is that it is generally speedy, economical and fair. Obviously, improvements can always be made; but we should retain the basic characteristics of arbitration. The dangers in the post-*McMahon* era are efforts to recast arbitration as a clone to litigation.... Simply put, the lengthy litigation, excessive costs and delay

[27] *See Id.* at A-12-14 (Rule 619).

[28] *Id.* at A-15-16 (Rule 627).

[29] *See* 54 Fed. Reg. No. 16 (Jan. 26, 1989) at 3883-86 (Notice of NYSE filing); 53 Fed. Reg. No. 218 (Nov. 10, 1988) at 45640-43 (Notice of NASD filing); 54 Fed. Reg. No. 16 (Jan. 26, 1989) at 3878-80 (Notice of AMEX filing); 54 Fed. Reg. No. 15 (Jan. 25, 1989) at 3705-08 (Notice of MSRB filing).

> prevalent in our court system is hardly the answer either for the securities industry or the public it serves. . . . Indeed, justice delayed, or made prohibitively costly, often results in justice denied.

Katsoris, *Securities Arbitration* at 370-371.

The Court should render agreements to arbitrate claims asserted under § 12(2) of the Securities Act enforceable due to the fairness and adequacy of SRO arbitration, and the fact that the Commission has continued to act to ensure that these forums remain fair and alleviate any perception that they are biased towards the securities industry. Such a result will hopefully remove the remaining judicial hostility against agreements to arbitrate securities law disputes which has lingered since *Wilko*, creating an unsubstantiated exception to the general assumption that an arbitration forum is capable of resolving statutory disputes. Only then will the congressional endorsement of arbitration be fully realized.[30]

B. The Legislative History of the Federal Securities Laws Contains No Evidence of Congressional Intent to Prohibit a Waiver of the Judicial Forum to Resolve § 12(2) Disputes.

The legislative history of both the Securities Act and the Exchange Act is devoid of any language evidencing congressional intent to prohibit arbitration of claims asserted under § 12(2) of the Securities Act. Petitioners contend that the Court should interpret as evidence of such intent both a passing reference to *Wilko* in a 1975 Conference Report underlying congressional amendments to § 28(b) of the Exchange Act, 15 U.S.C. § 78bb(b), and securities arbitration legislation introduced into Congress in

[30] Since an arbitration forum can adequately resolve disputes under § 12(2) of the Securities Act, there is no conflict between the purposes underlying the statute and arbitration. The Securities Act was generally designed to provide investors with full disclosure of material information concerning public

(footnote continued)

July 1988, one year after the *McMahon* decision. *See* Petitioners' Brief at 15-16, 43 and n.88. An analysis uncovers no evidence of congressional intent to bar arbitration of these claims in these actions of Congress and suggests that at most Congress desired in both instances to leave resolution of the arbitrability of federal securities law disputes to the courts.

1. The 1975 Amendments to the Securities Laws Did Not Result in a Congressional Ratification of *Wilko* But Rather Evidenced the Desire of Congress to Leave the *Wilko* Issue to the Courts.

In 1975, Congress made sweeping revisions to the Exchange Act designed in large part to clarify the expansive scope of SRO responsibilities and provide SROs with sufficient means of exercising "governmental-type" powers to effectively carry out their responsibilities under the Exchange Act. *See McMahon*, 107 S. Ct. at 2342 (citing S. Rep. No. 94-75, p. 22 (1975)). Among these revisions was an amendment to § 28(b) which furthered the ability of an SRO to police its members. The Conference Report to the § 28(b) amendment contained the following language:

> It was the clear understanding of the conferees that this amendment did not change existing law as articulated in *Wilko v. Swan*, 346 U.S. 427 [74 S. Ct. 182, 98 L. Ed. 168 (1953)], concerning the effect of arbitration proceeding provisions in agreements entered into by persons dealing with members and participants of self-regulatory organizations.

H.R. Rep. No. 229, 94th Cong., 1st Sess. 111 (1975). Petitioners argue that this sentence in the Conference Report resulted in a congressional ratification of *Wilko*.

(footnote continued)
offerings of securities in interstate commerce. *See* H.R. Rep. No. 85, 73d Cong., 1st Sess. 1-5 (1933). Section 12(2) makes it unlawful for any person who offers or sells a security by means of a prospectus or oral communication to materially misrepresent the nature of the security to a purchaser. These purposes underlying § 12(2) of the Securities Act will be enforced by an arbitration forum that is called upon to resolve a § 12(2) dispute.

The Court in *McMahon* has already established that this sentence did not result in a congressional ratification of *Wilko* and that Congress intended to leave the *Wilko* issue to the courts:

> [T]he *Wilko* issue was left to the courts: it was unaffected by the amendment to § 28(b). This statement of congressional inaction simply does not support the proposition that the 1975 Congress intended to engraft onto unamended § 29(a) a meaning different from that of the enacting Congress.

See McMahon, 107 S. Ct. at 2342-43. The McMahons argued that Congress had ratified the holdings of courts of appeals rendering § 10(b) disputes nonarbitrable since the sentence in the Conference Report evidenced congressional awareness of *Wilko*, the courts of appeals had extended the rationale underlying *Wilko* to § 10(b), and Congress did not act to legislatively alter these holdings. *Id.* The Court rejected this theory of congressional ratification since it found that the amendment to § 28(b) was related solely to preserving the self-regulatory role of the SROs and did not involve arbitration between member firms and their customers:

> [T]he amended version of § 28(b), like the original, mentions neither customers nor arbitration. It is directed at an entirely different problem: enhancing the self-regulatory function of the SROs under the Exchange Act.

McMahon, 107 S. Ct. at 2342.

The Court's interpretation of this Conference Report applies equally to the present case. The sentence in the Conference Report at most indicates that Congress desired to clarify that it was only legislating in the area of dispute resolution between the SROs and its members, and it did not "otherwise intend to affect *Wilko*'s construction of the Securities Act." *Id.* This is highlighted by the fact that the sentence in the Conference Report at issue underlies amendments to the Exchange Act and not the Securities Act.

The Court in *McMahon* rejected *Wilko*'s construction of § 14 of the Securities Act as evidencing congressional intent to prohibit an agreement to arbitrate a § 12(2) dispute, and found that *Wilko* was based solely on the Court's mistrust of arbitration and not on any evidence of congressional intent to prohibit arbitration of § 12(2) disputes. The Court should likewise reject petitioners' argument that the sentence in the Conference Report which underlies the amendments to § 28(b), along with the failure of Congress to legislatively alter *Wilko*, constitutes evidence of congressional intent to ratify *Wilko*. This single sentence cannot overcome the clear and unequivocal intent of Congress when it enacted the Securities Act and did not exempt the statute from the Arbitration Act. Petitioners' argument highlights why the Court, in analyzing similar arguments, has commented that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *See Girouard v. United States*, 328 U.S. 61, 69 (1946); *see also Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 241-42 (1970).[31]

An interpretation of the Conference Report to not prohibit agreements to arbitrate § 12(2) disputes also uniformly applies the Court's interpretation and application of congressional intent underlying the 1975 amendments to the Securities Act and the Exchange Act. The court of appeals found it implausible that Congress in 1975 intended the courts to resolve the arbitrability of § 10(b) disputes but did not intend them to resolve the arbitrability of § 12(2) disputes:

> [Appellees] claim that Congress, by preserving *Wilko* in the 1975 revisions of the Exchange Act manifested its intent that at least § 12(2) claims should remain non-arbitrable. We find it implausible that Congress intended to prohibit arbitration of Securities Act claims but intended to allow courts to determine the

[31] *See also Hirschey v. F.E.R.C.*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J. concurring) (criticizing routine deference to detail of congressional committee reports).

> arbitrability of Exchange Act claims. Similarly fine distinctions between the two Acts have been presented throughout the course of the debate over securities arbitration. . . . We do not, however, find these asserted distinctions controlling on the issue of arbitration.

Rodriguez, 845 F. 2d at 1299 (citations and footnotes omitted). Accordingly, the Court should affirm the court of appeals' finding that Congress did not ratify *Wilko* through the 1975 amendments.

2. Recent Congressional Action Further Evidences That Congress Has Left the *Wilko* Issue to the Courts.

The Court should also reject the argument of petitioners that the introduction of the "Securities Arbitration Reform Act of 1988", H.R. Rep. No. 4960, 100th Cong., 2d Sess. (1988), into Congress evidenced an intent of Congress to ratify the *Wilko* Court's interpretation of the anti-waiver provision of the Securities Act. *See* Petitioners' Brief at 16 & n.20. In the first instance, this bill cannot evidence congressional intent on any issue since it was never enacted into law and, as petitioners concede, never left the House Committee on Energy and Commerce. *See* Petitioners' Brief at 16 n.20. Furthermore, even assuming that the Act was enacted in a form identical to that in which it was introduced last year, it cannot even liberally be read as evidencing congressional intent to ratify *Wilko* or to legislatively overrule *McMahon*.

The proposed legislation sought to amend § 15(c) of the Exchange Act, 15 U.S.C. § 78c(c) by requiring that the SEC promulgate rules ensuring that investors make a knowledgeable choice about arbitration prior to signing an agreement. The bill also required that basic information be included in an arbitration award; that public arbitrators constitute a majority of each panel; and that parties be given additional background information on arbitrators. *See* H.R. Rep. No. 4960, 100th Cong., 2d Sess. at 2-6. Finally, the bill would have amended § 29(a) of the Exchange Act to state that an anti-waiver provision would not render as void an arbitration agreement that conformed with the proposed legislation. *Id.* at 6-7

The bill thus sought only to improve the arbitral process while ensuring that a public customer voluntarily enters into an arbitration agreement with a member firm.[32] Had Congress intended to ratify *Wilko* and/or overrule *McMahon*, it could have simply proposed legislation which would have amended the anti-waiver provision of the Securities Act and/or Exchange Act to prohibit the utilization by a member firm of a pre-dispute arbitration agreement with a public customer. The contents of the recently proposed legislation, combined with the failure of Congress to enact or even propose an amendment to the anti-waiver provisions of the securities laws to prohibit pre-dispute arbitration agreements, comports with the Court's finding in *McMahon* that Congress intended to leave the "*Wilko* issue" to the courts. *McMahon*, 107 S. Ct. at 2343.

II. The Court Should Enforce Agreements to Arbitrate § 12(2) Claims Without Being Deterred by *Stare Decisis* Concerns.

The Court should not be deterred by *stare decisis* concerns from enforcing agreements to arbitrate § 12(2) claims. The Court created the doctrine of *stare decisis* to enable individuals to conduct themselves in a manner consistent with the Court's precedents. The doctrine also prevents cases and issues from being continuously litigated which would impinge upon the Court's ability to orderly and efficiently administrate justice, or which would undermine public faith in the judiciary.[33] The important principles embodied in the doctrine of *stare decisis* should continue to be furthered by the Court in appropriate cases. The Court has made it clear, however, that *stare decisis* is not a mechanical formula and does not protect precedents from being overturned which are outdated and do not reflect the current state of the law:

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[32] All of the provisions of the bill seeking to improve the arbitral process are already part of the Uniform Code utilized by the SROs or are amendments to the Uniform Code proposed by SICA and the proposed changes to the rules of the SROs pending before the Commission for approval.

[33] *See Moragne v. State Marine Lines*, 398 U.S. 375, 403 (1970); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940); *Florida Dep't. of Health v. Florida Nursing Home Assoc.*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring).

> [S]*tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent or questionable, when such adherence involves collision with prior doctrine more embracing in its scope, intrinsically sound, and verified by experience.

Boys Markets, 398 U.S. at 241 (citing *Helvering*, 309 U.S. at 119; *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)). Accordingly, the Court has historically overruled outdated precedents which involved statutory interpretation:

> [W]e have explicitly overruled statutory precedents in a host of cases. *See, e.g., Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), overruling *Monroe v. Pape*, 365 U.S. 167 (1961); *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977), overruling *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967); *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), overruling *Machinists v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949); *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), overruling *Ahrens v. Clark*, 335 U.S. 188 (1948); *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), overruling *Moore v. Illinois Central R. Co.*, 312 U.S. 630 (1941); *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970), overruling *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962); *Peyton v. Rowe*, 391 U.S. 54 (1968), overruling *McNally v. Hill*, 293 U.S. 131 (1934). These actions do not mean the Court has been insensitive to considerations of *stare decisis*, but only that we recognize it as "a principle of policy and not a mechanical formula." *Boys Markets*, [398 U.S. at 241] (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 ... (Frankfurter, J.)).

Patterson v. McLean Credit Union, 108 S. Ct. at 1419, 1420-21; *see also Commissioner of Internal Revenue v. Estate of Church* 335 U.S. 632 (1949).

Since *Wilko* has been effectively overruled by the Court in *McMahon*, the Court can expressly overrule *Wilko* without impediment from the doctrine of *stare decisis* and render enforceable agreements to arbitrate § 12(2) disputes. Alternatively, the Court can render such agreements enforceable when the designated arbitration forum is capable of enforcing statutory rights under the federal securities laws, such as an SRO forum. Such a holding would be consistent with *McMahon* and *Scherk* and not infringe on the doctrine of *stare decisis*.

A. The Court Should Overrule *Wilko* Since It Has Subsequently Ruled That an Arbitration Forum Is Adequate to Protect Statutory Rights.

The Court should overrule *Wilko* and render agreements to arbitrate § 12(2) disputes enforceable since *Wilko*'s mistrust of arbitration was based upon its belief – since rejected by the Court – that arbitration is inadequate to enforce statutory rights:

> [T]he mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time.... Indeed, most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable.

McMahon, 107 S. Ct. at 2340-41.

McMahon is a precedent which provides uniformity in the Court's recent decisions interpreting the Arbitration Act and it is *McMahon* that the Court should defer to under the principles of *stare decisis* and not *Wilko*. Should the Court uphold *Wilko*, it would create a conflict with *McMahon* and the Court's interpretation of identical provisions of the Securities Act and the Exchange Act and would continue to foster the type of judicial hostility towards arbitration that it has labored to eliminate.

The great weight of authority has interpreted the Court's opinion in *McMahon* as overruling *Wilko* and, in fact, the dissenting opinion in *McMahon* recognized that "the Court effectively overrule[d] *Wilko*." *McMahon*, 107 S. Ct. at 2346. The majority of opinions of the courts of appeals, district courts and state

courts have held that *McMahon* effectively overruled *Wilko*.[34] Scholars and commentators have also reached the same conclusion. *See, e.g.*, Note, *The Arbitrability of Federal Securities Claims: Wilko's Swan Song*, 42 U. Miami L. Rev. 203, 227 (1987) ("One may ponder, What is left of the *Wilko* doctrine? This Note suggests that the answer is – nothing.").[35]

The policies underlying the doctrine of *stare decisis* are served not only by preserving precedents that accurately reflect the current state of the law, but also by formally recognizing that in certain instances precedents are outdated and should be recognized as such. Since the Court has rendered *Wilko* an outdated precedent and the great weight of authority has recognized this fact, individuals can no longer justifiably rely on *Wilko* to govern their affairs and this outdated precedent should be expressly overruled by the Court without impediment from the doctrine of *stare decisis*.

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[34] Shearson is aware of forty-one cases nationwide that have decided the enforceability of agreements to arbitrate claims asserted under § 12(2) and other sections of the Securities Act since the Court decided *McMahon*. The courts of appeals are split on the issue. The Fifth and Tenth Circuit Courts of Appeals have stated that the rationale underlying *McMahon* renders agreements to arbitrate § 12(2) claims presently enforceable. *See Rodriguez*, 845 F. 2d 1296 (5th Cir.), *reh'g en banc denied*, 850 F. 2d 1582 (1988) (per curiam); *Peterson v. Shearson/American Express, Inc.*, 849 F. 2d 464, 466 (10th Cir. 1988). The Second and Third Circuit Courts of Appeals have held that agreements to arbitrate § 12(2) claims continue to be unenforceable based on *Wilko* since the Court did not expressly overrule *Wilko* in *McMahon*. *See Chang v. Lin*, 824 F. 2d 219, 222 (2d Cir. 1987); *Osterneck v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 841 F. 2d 508, 512 (3d Cir. 1988). Twenty-two district court and state court cases nationwide have held that agreements to arbitrate § 12(2) and other Securities Act claims are enforceable based on *McMahon* while fifteen district court and state court cases have held such agreements unenforceable based on *Wilko*. A complete list of these district court and state court cases is contained at Appendix B.

[35] *See also The Supreme Court, 1986 Term – Leading Cases*, 101 Harv. L. Rev. 119, 286 n.46 (1987); Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 U.C.L.A. L. Rev. 623, 639 n.84 (1988); Fletcher, *Arbitration* at 113; Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 Tulane L. Rev. 1, 43 (1987).

B. The Court Can Follow Its Holding in *McMahon* And Enforce Agreements to Arbitrate § 12(2) Disputes at an SRO Forum Without Overruling *Wilko*.

The Court in *McMahon* established that an agreement to arbitrate a federal securities law dispute is enforceable as long as the designated forum is capable of protecting statutory rights. The Court ruled that *Wilko*'s refusal to enforce such an agreement was based on its finding that arbitration was inadequate to protect statutory rights:

> *Wilko* must be read as barring waiver of a judicial forum only where arbitration is inadequate to protect the substantive rights at issue.

McMahon, 107 S. Ct. at 2339.

The SRO forums designated in the arbitration agreement of the parties in the present case were expressly held in *McMahon* to be capable of protecting rights afforded by the Exchange Act, and they should be rendered enforceable in the present case to enforce rights afforded by the Securities Act, since there is no justifiable reason to construe the statutes differently for purposes of arbitrability.

Such an approach is also consistent with that taken by the Court in *Scherk*, where it ruled that an agreement to arbitrate a § 10(b) dispute was not prohibited by the anti-waiver provision of the Exchange Act. The *Scherk* Court assumed for purposes of its opinion that *Wilko* applied to § 10(b) of the Exchange Act. *McMahon*, 107 S. Ct. at 2340. Nevertheless, the Court ruled that the parties' agreement was enforceable since "arbitration was an adequate substitute for adjudication as a means of enforcing the parties' statutory rights" under the circumstances of that case which involved an international transaction. *Id.* at 2339. As the Court in *McMahon* concluded: "*Scherk* supports our understanding that *Wilko* must be read as barring waiver of a judicial forum only where arbitration is inadequate to protect the substantive rights at issue." *Id.*

This analysis allows *Wilko* to prohibit federal securities law claims from being arbitrated in an arbitration forum that is incapable of protecting statutory rights while prohibiting *Wilko* from barring arbitration of federal securities law claims at an SRO forum. *See* SEC *amicus* brief at 20-21.

III. A Ruling by the Court that an Agreement to Arbitrate A § 12(2) Dispute is Enforceable Should be Applied Retroactively to the Agreement of the Parties in the Present Case.

In the event the Court rules that an agreement to arbitrate a § 12(2) dispute is enforceable, that ruling should apply to the agreement of the parties in the present case, since the Court has held that a case should be controlled by the law existing at the time of the decision rather than that existing prior to or during the lawsuit. *See St. Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2025 (1987).[36] The Court has developed a limited exception to this rule to prevent a retroactive application of a decision which alters prior precedent and produces clearly unforeseen or substantially inequitable results. The test to be applied when considering whether to prevent a retroactive application of a decision is articulated in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), which instructs that intervening decisions of the Court which establish a new principle of law should not be applied retroactively when the decision: (1) overrules clear past precedent on which litigants may have relied or involves an issue of first impression whose resolution was not clearly foreshadowed, or (2) would produce substantial inequitable results. *Chevron*, 404 U.S. at 106-07. The *Chevron* test also requires that a court examine the history of the rule of law in question and its purposes and effect and determine whether retroactive application will further its purposes. *Id.*

The *Chevron* test is inapplicable to the present case since a ruling by the Court enforcing an agreement to arbitrate a § 12(2)

[36] *See also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981); *Thorpe v. Durham Housing Authority*, 393 U.S. 268, 281 (1969); *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801).

claim would not overrule clear past precedent on which petitioners could have justifiably relied. The Court's holding in *McMahon*, combined with its holdings in *Perry*, *Mitsubishi*, *Byrd*, *Keating*, *Cone* and *Scherk*, rejected the foundation of *Wilko* and cast substantial doubt on *Wilko*'s continued viability. The present case thus does not involve an issue of first impression whose resolution was not clearly foreshadowed. Secondly, such a decision will further the purposes underlying § 12(2) and the Arbitration Act and the rights afforded by § 12(2) will continue to be enforced in an arbitral, rather than in a judicial, forum. Lastly, since the arbitration agreement of the parties designates forums which the Court has ruled to be capable of protecting statutory rights, no substantial injustice or hardship will be inflicted upon petitioners through a retroactive application of the Court's decision. In fact, the Court's opinion in *McMahon* rendering § 10(b) and RICO claims arbitrable has already been applied retroactively requiring petitioners to arbitrate their claims asserted under these statutes against Shearson. Moreover, petitioners' § 12(2) claims are based on the same underlying facts as their § 10(b) and RICO claims.

The Court should adopt the ruling of the court of appeals which rejected petitioners' argument that the parties' agreement should not be enforced since they had no intent to agree to arbitrate § 12(2) claims at the time they entered into arbitration agreements with Shearson:

> We cannot conclude that appellees lacked the intent to agree to arbitrate because, at the time the customer agreements were signed, courts refused to honor clauses compelling arbitration of securities claims. At the same time the contracts were signed, the same circumstances existed barring arbitration of Exchange Act claims .... But appellees cannot now contend that they lacked the intent to arbitrate their Exchange Act claims in view of the Court's holding in *McMahon*. Neither the Supreme Court nor this Circuit considered the earlier lack of authoriztion to be an obstacle in *McMahon* .... or *Noble*. .... Both cases ordered arbitration of Exchange Act claims under analogous circumstances.

Rodriguez, 845 F. 2d at 1299.[37] Accordingly, a ruling by the Court that an agreement to arbitrate a § 12(2) claim is enforceable should be applied retroactively to the agreement of the parties in the present case.

[37] The lower federal courts have uniformly applied the Court's opinion in *McMahon* retroactively to enforce agreements to arbitrate § 10(b) and RICO claims after analyzing the *Chevron* test even though the courts held these claims nonarbitrable at the time the parties entered into their arbitration agreements. *See, e.g., Noble v. Drexel Burnham Lambert, Inc.*, 823 F. 2d 849, 850-51; *Ketchum v. Almahurst Bloodstock IV*, 685 F. Supp. 786, 789-90 (D. Kan. 1988).

CONCLUSION

Based on all of the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

DATED: New York, New York
February 14, 1989

Respectfully submitted,

THEODORE A. KREBSBACH
Counsel of Record for Respondent

Office of the General Counsel
Shearson Lehman Hutton Inc.
Two World Trade Center
New York, New York 10048
(212) 528-0565

JEFFREY L. FRIEDMAN

Office of the General Counsel
Shearson Lehman Hutton Inc.
(212) 528-0650
Of Counsel

APPENDICES

APPENDIX A

STATUTES INVOLVED

United States Arbitration Act

9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Securities Act of 1933

Section 12(2), 15 U.S.C. § 77*l*(2):

> Any person who –
>
> * * *

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 14, 15 U.S.C. § 77n:

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

Section 22(a), 15 U.S.C. § 77v(a):

The district courts of the United States and United States court of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and

actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

Securities Exchange Act of 1934

Section 10(b), 15 U.S.C. § 78j(b):

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

• • •

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 27, 15 U.S.C. § 78aa:

> The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

Section 29(a), 15 U.S.C. § 78 cc(a):

> Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule or an exchange required thereby shall be void.

APPENDIX B

District Court and State Court Cases Addressing the Enforceability of Agreements to Arbitrate Securities Act Claims Post-*McMahon*

A. Cases Holding Securities Act Claims Arbitrable Based on *McMahon*

Second Circuit

DeKuyper v. A. G. Edwards & Sons, Inc.,
695 F. Supp. 1367 (D. Conn. 1987), *aff'd upon reconsideration*,
N-85-529 (EBB) (D. Conn. Nov. 23, 1988)

Third Circuit

Kavouras v. Visual Products Systems, Inc.,
680 F. Supp. 205 (W.D. Pa. 1988)

Ryan v. Liss, Tenner & Goldberg Securities Corp.,
683 F. Supp. 480 (D.N.J. 1988)

Fifth Circuit

Baldwin v. Cowan & Company,
No. H-86-4247 (S.D. Tex. Jan. 19, 1988)

Rosenblum v. Drexel Burnham Lambert, Inc.,
[Current] Fed. Sec. L. Rep. (CCH) ¶ 94,031 (E.D. La. Aug. 19, 1987)

Seventh Circuit

Hallal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
No. 88 C 2405 (N.D. Ill. Dec. 13, 1988)

Ninth Circuit

Staiman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
673 F. Supp. 1009 (C.D. Cal. 1987)

Tenth Circuit

Adams v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
[1987-88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,741 (W.D. Okla. Apr. 21, 1988)

Jeppsen v. Piper, Jaffrey & Hopwood, Inc.,
[Current] Fed. Sec. L. Rep. (CCH) ¶ 93,996 (D. Utah Aug. 16, 1988)

Reed v. Bear, Stearns & Co.,
[Current] Fed. Sec. L. Rep. (CCH) ¶ 94,126 (D. Kan. Aug. 19, 1988)

Simon v. Smith Barney, Harris Upham & Co., Inc.,
No. CIV-88-1124-T (W.D. Okla. Jan. 11, 1988)

Eleventh Circuit

Aronson v. Dean Witter Reynolds, Inc.,
675 F. Supp. 1324 (S.D. Fla. 1987)

Bender v. Prudential Bache Securities, Inc.,
No. 87-8572-CIV-ZLOCH (S.D. Fla. Mar. 14, 1988)

Benoay v. E.F. Hutton & Company,
No. 82-6709-Civ.-Paine (S.D. Fla. Jan. 8, 1988)

Guest v. Prudential-Bache Securities, Inc.,
No. 87-8942-CIV-ZLOCH (S.D. Fla. June 1, 1988)

Schuster v. Kidder, Peabody & Co.,
No. 86-6149-CIV-PAINE (S.D. Fla. 1988)

Sease v. PaineWebber, Inc.,
No. 87-1368-CIV-NESBITT (S.D. Fla. March 15, 1988)

Singer v. E.F. Hutton & Co.,
No. 87-6921-CIV-PAINE (S.D. Fla. 1988)

Yudelevich v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
No. 87-1594-CIV-RYSKAMP (S.D. Fla. Mar. 16, 1988)

State Court Cases

Friedman v. E.F. Hutton & Co., No. CL88-10138-AP (Cir. Ct. Fla. Feb. 9, 1989)

Rocz v. Drexel Burnham Lambert, Inc.,
743 P.2d 971 (Ariz. App. 1987)

U.S. Optical Frame Co. v. Prudential-Bache Securities, Inc.,
No. 86-14071 (Cir. Ct. Fla. Sept. 28, 1987)

B. Cases Holding Securities Act Claims Nonarbitrable Based on *Wilko*

Second Circuit

McCowan v. Dean Witter Reynolds, Inc.,
682 F. Supp. 741 (S.D.N.Y. 1987)

Pompano-Windy City Partners Ltd. v. Bear, Stearns & Co.,
698 F. Supp. 504 (S.D.N.Y. 1988)

Third Circuit

Abadian v. Drexel Burnham Lambert, Inc.,
No. 88-0186 (E.D. Pa. Aug. 5, 1988) (LEXIS, Fedsec library, Courts file)

Ballay v. Legg Mason Wood Walker, Inc.,
No. 88-6867 (E.D. Pa. Dec. 21, 1988)

Helfricht v. Jefferies & Co.,
No. 85-0466 (D.N.J. Oct. 8, 1987) (LEXIS, Fedsec Library, Courts file)

McCullough v. Shearson Lehman Brothers, Inc.,
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